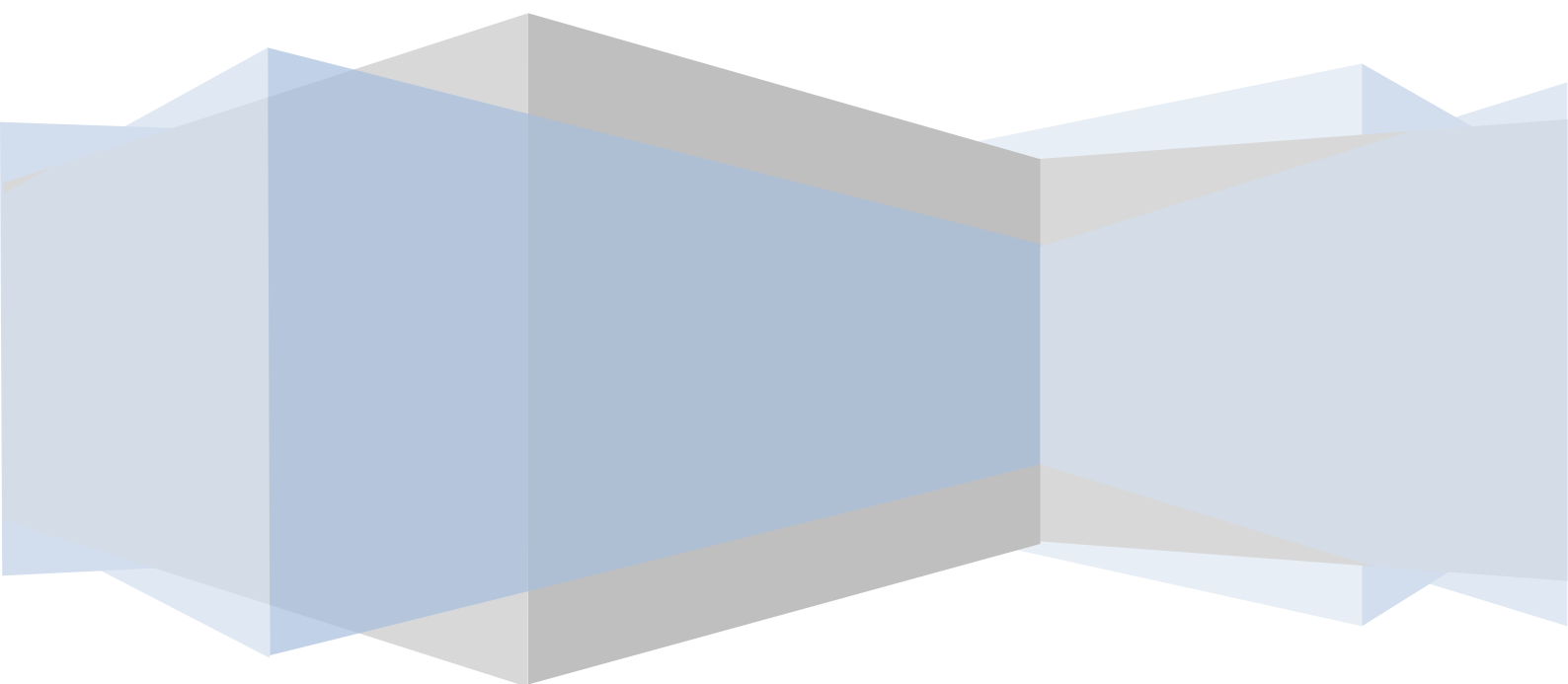




# **Enhancing Media Privilege in Montenegro**

**A comparative analysis of laws from France, Belgium and  
Sweden with Montenegrin legislation**

**Fabien SEGNARBIEUX**



*Fabien Segnarbieux is a student from France, holding a Bachelor degree in Public Law at Montpellier University. After an exchange year done in the Aristotle University of Thessaloniki, he is today finishing his MA of International Relations at Sorbonne University (Paris). He has been intern in CEDEM during the summer 2013. Involved in a project of freedom of media, this research paper (under supervision of Emir Kalač and Dženita Brčvak, researchers) is his contribution to our institution.*

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## INTRODUCTION

According to the French NGO, “Reporters Without Borders”(RSF), Montenegro is ranked 113<sup>th</sup> out of 170 on its annual Press Freedom Index (2013 version). Ranked between Israel and United Arab Emirates, Montenegro is sadly the second worst ranked country of Europe (after FYROM). RSF focuses on these key reasons to explain its decision:

- Problems with the court
- Frequent denial of access to information,
- Violence against journalists
- Use of advertising money as a tool of pressure
- Poor legislation.

However, after having read other reports and studying the issue on the ground; we can say the situation is much more nuanced and complicated. With 40 periodical media printed<sup>1</sup> the Montenegrin media landscape is dense and very competitive. Likewise, the success of the TV show “Robin Hud” shows there is a place for an independent show on a public channel<sup>2</sup>. Reports have also pointed out the existence of a climate of hate between pro-government and opposition media. Two divided camps fight to impose their own point of view of the country. The situation is serious because the conflict has clearly undermined the trust between citizens, institutions and the media itself<sup>3</sup>. Finally, breach of presumption of innocence and defamation cases are issues daily reported.

The RSF report statement must therefore be nuanced, although Media freedoms are frequently being threatened, they often show lack of standards." Debating who is right or wrong is a waste of time, we must focus on this main question:  
How is it possible to enhance today's situation?

One possible answer could be, “by the law” because the law has the power to prescribe behaviours and enhance practices. The RSF is clearly right in condemning the poor Montenegrin legislation, as it opens up a port of entry to higher media freedoms and its standard.

## A COMPARATIVE ANALYSIS IN THE FIELD OF MEDIA PRIVILEGE LAW

This analysis will focus on the topic of protection of sources<sup>4</sup> due to the fact that it was brought to the public's attention in the last couple of years by the action of the European Court of Human Rights (ECHR). Media Privilege improves the freedom of the media and enhances its ability to be a “public watch-dog”<sup>5</sup>. Standards are not forgotten because law

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<sup>1</sup> Swedish Bar Association and the New York City Bar Association, (2013), *Independent legal mission to study press freedom in Montenegro*, As Accessed on 07/10/2013

<sup>2</sup> “Robin Hood” is a show set in service to the citizens with the aim to increase the level of trust between people and institutions. It is focused on solving the problems that citizens face every day. Robin Hood” has solved 540 cases in five years, covering the stories concerning about 60.000 citizens and groups with 70% success rate.” <http://gamm.org/rhood.html> (accessed on 25th July 2013)

<sup>3</sup> P. 27 Swedish Bar Association and the New York City Bar Association, (2013), *Independent legal mission to study press freedom in Montenegro*, As Accessed on 07/10/2013

<sup>4</sup> Also called « Media Privilege »

<sup>5</sup> *Goodwin v. UK, 1996. ECHR*

prescribes behaviour and raises consciousness. Therefore, the Media is highly aware that it has been granted privilege that it must not misuse. The European Commission in its screening of Montenegro<sup>6</sup> was clear: the current difficulty Montenegro is facing is its lack of financial and human resources. A comparative analysis is then of use because it underlines examples and approaches upon the issue. By studying other countries we will be able to provide tools to enhance Montenegrin Media Privilege legislation.

Firstly, *Why is Protection of Sources also called Media Privilege?*

It is the right accorded to journalists not to disclose the source of its information. It also means the impossibility for authorities to compel a journalist to reveal its source. Finally, it refers also to the security accorded to sources not to be discovered after revelation. This protection was, for example, recognized in “The Declaration of the rights and duties of journalists”<sup>7</sup> (article 7):

*“To observe professional secrecy and not to divulge the source of information obtained in confidence”*

Recognized by the European Federation of Journalists; this charter has a scope that should not be underestimated because it provides a framework widely accepted by the profession and authorities.

A question is then raised, *on which countries should we base our study?*

- Belgium

Belgian legislation derives itself primarily from the law on protection of sources of 2005. Unanimously welcomed by lawyers and journalists for its efficiency and its absence of legal holes, Belgian legislation is frequently used as a model exportable for other countries (for instance France).

- France

The French example will be focused on for several reasons. Adopted later (2010), it has decided diverge from Belgian legislation and stick to the European Court of Human Rights (ECHR) position. By choosing France, we expose an example that gains significance in the light of the Belgian experience. Moreover, this law does not provide sufficient protection and a new law is about to be voted. French law is therefore a counter-example that despite commendable ideas is not capable of providing a satisfying legal framework regarding Media Privilege.

- Sweden

Sweden is an unusual example of Media Privilege because it does not emphasize on Protection of Sources but rather on Protection of Anonymity (a larger scope). Moreover, the protection is not accorded by the law but by the constitution and its “Freedom of Press Act” (from the XVIII century). Sweden is today considered as the most protective Media Privilege system in the world. By choosing Sweden, we choose an atypical example that has proven its efficiency through the decades.

The question of countries resolved, it remains to define proper methodology. In our first part, we will expose the stakes that raise Protection of Sources. Indeed, Protection of

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<sup>6</sup> Chapter 23 “judiciary and fundamental rights”

<sup>7</sup> Also called “Munich Charter” signed in 1971

Sources is a complex concept that must be clarified in order to handle it properly **(I)**. To run our comparative analysis, we have defined a set of questions that will be useful to understand each legal framework. This will aim at comparing their approaches and understand what would fit the most to Montenegro **(II)**.

Set of questions:

- *Who is entitled to invoke Media Privilege?*
- *Is the protection absolute?*
- *What kind of penalties does the law contain?*
- *Is it possible to bypass Media Privilege?*

Finally, recommendations will be proposed **(III)** for Montenegro. It would be wrong to think a legal regime may be exportable, copy-pasted to a country without proper changes. It is at the light of this argument that we will provide a set of recommendations to Montenegro and an example of legislation.

## 1. THE COMPLEX CONCEPT OF MEDIA PRIVILEGE

In this part we will describe the legal concept of Media Privilege. We do not aim at presenting a full and detailed definition of the topic but the necessary content for understanding the things at stakes.

### 1.1 PROTECTION OF SOURCES DOES NOT MEAN JOURNALIST'S IMMUNITY

There often exists a misunderstanding in regards to what exactly covers Media Privilege. Studying the debate surrounding the vote of the Belgian law on Protection of Sources provides a very relevant example<sup>8</sup>. Indeed, Belgian MP's underscored the risks of misuse of Media Privilege because it may be used as "immunity". Journalists could use their right to silence to bypass their duty of proving statements in front of the Court. Thus, there would be an imbalance between journalists and so-called "victims of press". Following this argument may lead to restrictions of Media Privilege. Indeed, if protection of sources is a "non called" immunity, its scope of application should be restricted. This amalgam is a mistake because it constitutes confusion between Protection of Sources and responsibility of journalists themselves. Media Privilege is not a tool usable by journalists to protect their responsibility. A journalist will always have to prove the validity of its statement in front of the Court. Giving as unique evidence the testimony of an anonymous source may be considered insufficient and leads to the condemnation for libel. Consequently, Protection of Sources does not modify the journalist's responsibility<sup>9</sup> and any restriction based on this argument would constitute a threat to security of sources.

### 1.2 WHO SHOULD BE ENTITLED TO INVOKE MEDIA PRIVILEGE?

The last decade has revolutionized journalism and its means of expression. Citizen journalism, pro-am journalism, blogs, all these concepts illustrate a complete change of journalistic philosophy. The success of South Korean media "Oh My News<sup>10</sup>" and its slogan "every citizen is a reporter" shows a trend; the distinction between professional and amateur journalists is disappearing. Who should therefore be entitled to use Media Privilege?

Firstly, we need to define the platform. What kind of media platform should protect its sources? We consider press in a broad sense in order that no platform should be excluded. Written press, radio, television and Internet should be equally treated.

Then, we must identify the individuals concerned. We mainly see two approaches:

- *Focus on the figure of the journalist*

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<sup>8</sup> Exposed for instance in:

Englebert J., (2007), *Le statut de la presse : du droit de la presse au droit de l'information*, Retrieved from Université Libre de Bruxelles, As Accessed on 07/19/2013

<sup>9</sup> §14 Englebert J., (2007), *Le statut de la presse : du droit de la presse au droit de l'information*, Retrieved from Université Libre de Bruxelles, As Accessed on 07/19/2013

<sup>10</sup> for some details: <http://www.guardian.co.uk/media/pda/2011/jan/19/ohmynews-korea-citizen-journalism>

France has established a distinction between journalist and non-journalist<sup>11</sup>. According to French law, regularity of work and existence of an income are criteria to understand what is a journalist. This is an example and there exists other criteria of distinction (for instance, holding a “press card”). This approach excludes all the people who practice journalism as a hobby or as a casual activity; there would be a legitimate journalism and a non-legitimate one according to this approach<sup>12</sup>. This distinction consequently neglects the trend appeared in the last couple of years.

- *Focus on the concept of information*

This approach refuses clearly the “legitimate/non-legitimate” distinction, and would be entitled to protect its sources, with each person contributing to the collection of information. We therefore see a large extension to the scope of Media Privilege application. Casual journalists, bloggers and other entities would be included and subject to this protection. What remains, however, is the need to define the concept of information. We will use a sample from Belgian legislation<sup>13</sup>:

*“Each person that contributes directly to the gathering, editing, production or the dissemination of information through media for the public.”*

Finally, one question may be raised; will the judge take into consideration the fact that professional journalists are ruled by a code of ethics while “casuals” are not? Judge may not apply the code of conduct to them however they may apply common ethics existing in freedom of expression<sup>14</sup>.

### **1.3 AT WHICH LEVEL OF JUDICIAL PROTECTION SHOULD MEDIA PRIVILEGE BE INCLUDED?**

With this question we refer directly to Hans Kelsen’s theory of the pyramid of norms<sup>15</sup>. Should the protection be constitutional or legislative? Protection of Sources is included in the wider concept of freedom of expression and freedom of press. It is consequently possible to integrate it at the constitutional level (it will just depend on the value the legislator wants to give). Constitutional protection will make the original vote and further modifications more difficult. However, a constitutional level would prevent a condemnation of the ECHR.

### **1.4 WHAT KIND OF PENALTIES MAY THE LAW CONTAIN?**

The question of sanctions must be taken into account because it is the other aspect of protection. How may a prohibition be able to deter any behavior threatening a right? By providing an efficient sanction. We mainly see three sanctions:

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<sup>11</sup> Article 1 § 2 subparagraph 2 of French Law on Protection of Sources: “A journalist is to be considered any person who is practicing their profession in one or more media organizations, press agencies, online communication, audiovisual communication and practicing on a regularly and paid basis the gathering of information and its diffusion to the public”

<sup>12</sup> §34 Englebert J., (2007), *Le statut de la presse : du droit de la presse au droit de l’information*, Retrieved from Université Libre de Bruxelles, As Accessed on 07/19/2013

<sup>13</sup> Judgement of Belgian Constitutional Court, June 7th 2006

<sup>14</sup> Englebert J., (2007), *Le statut de la presse : du droit de la presse au droit de l’information*, Retrieved from Université Libre de Bruxelles, As Accessed on 07/19/2013

<sup>15</sup> Kelsen Hans, “Pure theory of law” (1934)



- *Procedural*
- *Civil*
- *Penal*

Firstly, a legislator can deter any behavior by making it useless. For instance, declaring “*nullity of acts*” in both civil and penal law would consider any evidence (resulting from an illegal search of source) irrelevant in front of the Court. Another sanction possible would be a “*fine*,” and it may even be possible to include journalists in the scope of this sanction. Indeed, this risk may discourage journalists to reveal their sources while people would be encouraged to become whistle blowers. Choosing the “right” amount of money is important because it will determine the “chilling effect” of the sanction. Finally, *penal law* may be taken into consideration. A violation of protection of sources may be considered as an offence and once again, everyone may be concerned (even journalists<sup>16</sup>).

Reaching a good balance is crucial. A sanction too high may deter behavior but also deter the right enforcement by the judge. Likewise, an insufficient sanction may create an “empty shell” protection. It is therefore according to each state’s judicial tradition that a choice will be made.

## **1.5 IS IT POSSIBLE TO BYPASS MEDIA PRIVILEGE?**

Journalistic sources are threatened by practices that may be hardly discerned at first glance. A law on protection of sources will also have to contain specific provisions if it wants to provide full protection. The case of concealment of confidentiality is a good example. Indeed, sources tend to come from professions ruled by the principle of confidentiality (judge, lawyers, doctors etc....) and if the information comes from a breach of confidentiality, the journalist may be prosecuted for concealment of it. We therefore see a way to sanction “*by other means*” the silence of journalists. Investigative measures such as search, seizure or wiretapping are other examples. Indeed, the judiciary power may order it and the journalist despite its refuse will not be able to protect its sources. Once again, the law will have to consider these aspects and for instance; excluding journalists from the scope of these measures is an option that must be kept in mind.

## **1.6 RIGHT TO THE PROTECTION OF JOURNALISTIC SOURCES ACCORDING TO THE EUROPEAN COURT OF HUMAN RIGHTS**

On June 6<sup>th</sup> 2006, Montenegro ratified the European Convention of Human Rights. This means Montenegro must comply with duties imposed by the Convention and its Jurisprudence. Initially, ECHR did not make any clear reference to protection of journalistic sources. It is only with its famous case *Goodwin v. UK, 1996*<sup>17</sup> that European

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<sup>16</sup> See Sweden’s model

<sup>17</sup> A reporter from the magazine “*The Engineer*” had published a document proving the financial difficulties of the company “Tetra”. The company wanted to discover the source and asked the judge to order disclosure. Later justice condemned the reporter to a fine seen its refuse of disclosure. The European Court condemned UK<sup>17</sup> on the ground that the order of disclosure was a legitimate reason for a commercial enterprise but not an overriding

judgement defined the role, the importance and the restrictions possible regarding Media Privilege (mainly in its §39 and §40).

### §39

*The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance*

*Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms.*

*Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.*

*Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.*

*These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under paragraph 2 of Article 10 (art. 10-2).*

### §40

*As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established.*

*Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press.*

*Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10 (art. 10-2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.*

*The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 (art. 10) the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".*

With this case, ECHR recognized protection of journalistic sources and made it fall within the scope of article 10 (freedom of expression<sup>18</sup>). Paragraph 39 and 40 are

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public interest. Moreover, there was not proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve it

<sup>18</sup>ARTICLE 10 – European Convention of Human Rights

important because the Court strongly recognizes the importance of Protection of Sources. That explains the reference to expressions such as “one of the essential foundations of a democratic society” or “vital public-watchdog role of the press” (§ 39). However, the Court leaves the door open to restrictions and does not consider Media Privilege as an absolute right. In its article 10, the Court recognizes the possibility of restrictions to freedom of expression. This is understandable because the Court never recognized freedom of expression absolute (Article 10 may enter into conflict with, for instance, Article 8 and its right to privacy). However, these restrictions will be legal only if it follows the fulfilment of 3 criteria:

- Existence of an “overriding public interest” (§ 39)
- Necessity in democratic society (detailed in Art. 10-2 ECHR)
- Proportionality of measures (§40 “the restriction was proportionate to the legitimate aim pursued”). The last criterion reveals the existence of a real “control of proportionality” by asking the question: Were there more adapted measures?

The European Court also brings to member state’s attention its intention to provide strict scrutiny (“most careful scrutiny”) in further cases. This is also explained by the will from the Court to allow national appreciations on the issue (§40 “national margin of appreciation”). Thus, the European Court respects different legal traditions exchange for a stronger control.

Referring to later cases may help to understand what kind of use the European Court applied later on. In *Ernst and others v. Belgium, 2003*<sup>19</sup>, the court condemned Belgium because of the non-proportionality of measures (“The Court found that the Belgian Government had not shown that a fair balance between the competing interests had been struck. Even though the reasons relied on were “relevant”, they were not “sufficient” to justify searches and seizures on such a large scale<sup>20</sup>”). *Ernst and others* must be linked with *Roemen and Schmitt v. Luxembourg, 2003* because the judge condemned both countries on the ground of the existence of alternative measures. A more recent case *Martin and others v. France, 2012* illustrated once again the balance done by the Court.

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1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and **are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.**

<sup>19</sup> Searches had been done in newspapers’ offices and journalists’ homes (8 different places at the same time). These investigative measures were motivated by the existence of some leaks (due to breaches of confidence) concerning sensitive criminal cases.

<sup>20</sup> Link to the judgment

[http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-795697-812799#{"itemid":\["003-795697-812799"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-795697-812799#{"itemid":["003-795697-812799"]})

In, *Tillack v. Belgium*, 2007<sup>21</sup>, the court condemned Belgium emphasizing “that a journalist’s right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources”<sup>22</sup>

In, *Financial Times Ltd and Others v. the United Kingdom*, 2009, the court recognized a violation of article 10 because of the absence of necessity in a democratic society<sup>23</sup>. The interest of identifying a source from private company Interbrew was not sufficient compared to the public interest in protecting journalistic sources.

## 2. MEDIA PRIVILEGE: EXAMPLES OF POLICY WITH MONTENEGRO

### 2.1 A BELGIAN LIBERAL LEGISLATION<sup>24</sup>

The Belgian law was voted in 2005 after its condemnation in front of the European Court of Human Rights<sup>25</sup>. It must be made clear that the Belgian Constitutional Court amended the text by judgment on June 6<sup>th</sup>, 2006 modifying largely the scope of the law.

- *Who is entitled to invoke Media Privilege?*

The answer is provided by **Article 2**. It is this article that was amended by Belgian judge in 2006. The new provision considerably extends the scope of media privilege<sup>26</sup>.

(New) **article 2**:

*Is entitled to protection of sources, these persons:*

*§1 Each person that contributes directly to the gathering, editing, production or the dissemination of information through medias for the public*

*§2 Editorial staff collaborators that is each person who during the performance of its duties may acknowledge information leading to the identification of a source through gathering, editing, the production or dissemination of these information.*

Article 2 emphasizes on « information » rather than on the distinction between professional/non-professional journalists. Anyone who is “contributing” to the information (**Article 2 § 1**) will be entitled to use protection of sources. Moreover, **Article 2 § 2** refers to the “editorial staff” but not only because it covers people that it may enter into contact with the content of the information and its source. This protection goes very far because Protection of sources may be applied even for

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<sup>21</sup> Hans Martin Tillack was suspected to have bribed a European civil servant to reveal a scandal. In order to identify the source, Belgian authorities opened an investigation upon breach of confidence and operated searches at Tillack’s home

<sup>22</sup> Link to the judgment

[http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2189531-2328879#{"itemid":\["003-2189531-2328879"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2189531-2328879#{)

<sup>23</sup> The case concerned the complaint by four UK newspapers and a news agency to have been ordered to disclose documents to Interbrew, a Belgian brewing company

<sup>24</sup> 7 AVRIL 2005. — Loi relative à la protection des sources journalistes

<sup>25</sup> *Ernst and others v. Belgium*, 2003

<sup>26</sup> Both articles are available in appendix II

“secretaries and drivers”<sup>27</sup>. Consequently, the new writing given by the Belgian Constitutional Court is highly liberal and such protection is given to more people than the journalists themselves. Finally, no distinction is done among media platforms (internet, press, radio and television are equally concerned)

- *In which case may the person involved remain silent?*

**Article 3** details four cases where the individual will be allowed to remain silent.

- §1 If it may reveal the identity of the source
- §2 If it may reveal the nature or the origin of that information
- §3 If it may reveal the identity of the author of a text or an audiovisual production
- §4 If the disclosure of the content or the document itself may lead to the identification of the source

- *Is the protection absolute?*

No, restrictions are allowed if it follows a set of specific criteria. **Article 4** provides these conditions:

- The order must come from an independent judge (investigative judge)
- The information is related to a crime that constitutes a threat to physical integrity of one or more people.
- §1 The information has a crucial importance for the prevention of the crime.
- §2 The information cannot be obtained in another way.

Restrictions provided by article 4 are “objective<sup>28</sup>” because it uses criteria that are not prone to interpretation. The concept of “physical integrity” is clear and may be found in the Belgian Penal Code. Likewise, imposing the authorization of the restriction by an independent judge is a pledge of legal security.

- *What about the sanctions?*

Belgian law does not express sanctions concerning breach of protection of sources. This constitutes a lack with potential chilling effects for sources.

- *Is it possible to bypass Media Privilege?*

**Article 6 and 7** concern the offence of concealment of confidentiality. The people “involved in article 2 will not be prosecuted by these legal means”. It is consequently impossible to prosecute journalists for this offence. Moreover, Belgian legislator defined the legal regime concerning search, seizure and wiretapping in **Article 5**. They are allowed to legislate against people targeted in article 2 if the data prevents the offence stated in Article 4.

Finally, it must be pointed out that *Belgian law achieved a good balance between Protection of Sources and restrictions*. Despite the fact no sanctions have been integrated in the text, rights and duties compiled by the law are so clear that a breach of protection

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<sup>27</sup> Deltour P., ‘La protection des sources journalistiques en Belgique : Un modèle qui vaut l’attention’, OSCE – SHDM, 07/13/06 and 07/14/06

<http://www.osce.org/fr/odihr/19932>

<sup>28</sup> Goulesque-Moneaux B. and Iweins P-A (2012), Pour une réforme de la protection des sources d’information, *Huffingtonpost.fr* as accessed on 10/07/2013

< [http://www.huffingtonpost.fr/benoit-goulesquemonaux/reforme-de-la-protection-sources-journalistes\\_b\\_1658225.html](http://www.huffingtonpost.fr/benoit-goulesquemonaux/reforme-de-la-protection-sources-journalistes_b_1658225.html) >

of sources may hardly happen; this is why Belgian law on Protection of Sources can be considered as an example for other countries<sup>29</sup>.

## 2.2 PROTECTION OF SOURCES IN FRANCE AND “OVERRIDING INTEREST”<sup>30</sup>

Media Privilege was amended recently in France and it is once again due to a condemnation in front of ECHR<sup>31</sup>. However, a new bill is about to be voted in by the French parliament. It is by choice that we have decided not to focus on this “on-going” bill of law. Finally, it also must be taken into consideration that the law was heavily criticized during its vote. “Trap<sup>32</sup>” or “empty shell<sup>33</sup>” were for instance expressions used to describe its scope.

### - Preliminary remarks

The law of 2010 stated for the first time the principle of protection of sources in French law. This principle is given by **Article 1 §2 subparagraph 1** (“Confidentiality of journalists’ sources is protected in the performance of their informative mission to public”). Moreover, the end of **subparagraph 4** (“This breach may under no circumstances consist of the obligation for the journalist to reveal its sources”) confirms the extent of this protection. Journalists will not be forced to disclose their source and it is only by other means that the source may be revealed.

### - Who is entitled to invoke Media Privilege?

It is **Article 1 §2 subparagraph 2** that indicates the approach chosen.

#### **Article 1 §2 subparagraph 2:**

*“A journalist is to be considered any person who is practicing their profession in one or more media organizations, press agencies, online communication, audiovisual communication and practicing on a regularly and paid basis the gathering of information and its diffusion to the public”*

French legislator decided to create a distinction between professional and non-professional journalists by using regularity and income criteria. Obviously, editing staff is also covered unless they do not fulfill these two criteria. We also do not see a distinction between media platforms.

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<sup>29</sup> “Since May 2005 the Belgian law is now protecting journalistic sources in accordance with Article 10 of the European Convention on Human Rights and in application of the European Court’s case law on this matter. The Belgian law can also inspire other countries to develop new standards of protection of journalistic”.

Voorhoof Dirk. “Belgium: Law on the protection of journalistic sources may inspire other countries”. *Ghent University*. (2008/02). Accessed on 07/26/13

<[http://www.psw.ugent.be/Cms\\_global/uploads/publicaties/dv/05recente\\_publicaties/Belgium.Lawsources.versi on2008.pdf](http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/Belgium.Lawsources.versi on2008.pdf)>

<sup>30</sup> LOI n° 2010-1 du 4 janvier 2010 relative à la protection du secret des sources des journalistes

<sup>31</sup> *Dupuy et autres c. France*, 2007

<sup>32</sup> Plenel E. (2008), Secret des sources: Attention, cette loi est un piège !, *Mediapart*, as accessed on 07/18/2013

<<http://www.mediapart.fr/journal/france/150508/secret-des-sources-attention-cette-loi-est-un-piege>>

<sup>33</sup> Bonnet O. (2008), Protection des sources des journalistes : l’entourloupe de la loi Dati. *Blog* as accessed on 05/18/2013

<<http://olivierbonnet.canalblog.com/archives/2008/05/15/9188620.html>>

Moreover, **subparagraph 4** extends the scope of the protection by using the concept of “indirect violation” of protection of sources.

**Article 1 § 2 subparagraph 4:**

*“An indirect violation to the confidentiality of sources is to be considered as (...) any attempt to uncover a journalist's sources by means of investigation on any individual, who, due to it's usual relationship with the journalist, could potentially detain information, which may lead to the identification of its sources”*

According to French law, protection of sources is therefore applied to individuals “in contact” with journalists. This contributes to extend the scope of Media Privilege to individuals without links with journalism in general. However, French law does not have a scope as extended as the one of its Belgian neighbor.

- *Is the protection absolute?*

No and it is **Article 1 §2 subparagraph 3** that details the restrictions:

*“Protection of sources may be infringed directly or indirectly only when an overriding public interest justifies it and if the measures considered are strictly proportionate to the legitimate aim pursued. This breach may under no circumstances consist of the obligation for the journalist to reveal its sources”*

The link between this provision and the jurisprudence of *Goodwin v. UK* is clear. Today's judicial regime in France refers to the « national margin of appreciation » recognized by ECHR. However, both notions of « overriding interest » and « proportionality » are blurry and will need further interpretations by the French Supreme Court « Cour de Cassation ». When Belgian law offered clear criteria of restrictions, French legislation may lead to some abuses. What is an overriding public interest? Is it a concept close to « raison d'État »? Likewise, the proportionality of measures differs from each person. The results is that this law does not provide a satisfying legal framework concerning restrictions to Media Privilege. This is confirmed by **Article 1 §2 subparagraph 5** that tries to clarify concepts but bring more confusion than something else:

*“During a penal procedure, it is taken into account, in order to assess the necessity of the breach, the seriousness of the crime or of the offence, the importance of the information that is being sought for the repression or the prevention of the offence and the fact that the investigative measures envisaged are indispensable to the establishment of the truth”*

- *What kind of penalties does the law contain?*

**Article 5 and 6** provide procedural sanctions (« nullity of acts »). However, nothing is stated about offence or fine. If we link this set of sanctions with the restriction allowed if existence of « overriding interest », we think French law does not provide adequate sanctions to deter behaviour endangering Protection of Sources.

- *What about means to bypass media privilege?*

The law did not erase the *offence of concealment of judicial confidentiality or professional confidentiality*. Consequently, French journalists are still threatened by this penal offence. **Article 2 §2** contain dispositions concerning search:

*“Searches are realized by written and motivated decisions from the judge indicating the nature of the infraction on which the investigation is based on, the reasons*



*justifying the search and its object. The content of the decision will be exposed at the beginning to the people present”*

French law does not provide any content regarding seizure or wiretapping. That means these means are allowed only if it complies with dispositions of this law.

*French law definitely does provide a better protection than before. However, it definitely lets the door opened to some abuses.* Three years after its vote, it is difficult to have a correct hindsight of the law itself. However, we must point out the fact that the law was already breached by the political power in the “fadettesgate<sup>34</sup>”. Despite the nullity of proceedings<sup>35</sup> declared, it brought to public’s attention the ins and out of the law and its impossibility to provide good protection to journalistic sources after an infringement. We also see content that may be condemned by ECHR because it uses the concept of “national margin of appreciation” from ECHR jurisprudence. European judges will most certainly use the concept of “most careful scrutiny” in future cases from France.

## 2.3 SWEDEN AND ITS “RIGHT TO ANONYMITY”<sup>36</sup>

Swedish legislation concerning protection of sources is extremely different compared with the Belgian and French examples. Indeed, Protection of Sources is contained within the Freedom of Press Act (FPA) adopted in 1766 and amended for the last time in 1949. Contrary to previous examples exposed, FPA is part of the Swedish constitution. That means judicial protection of Media Privilege is not legislative but constitutional in Sweden. It also means that the Media Privilege framework is above the European Convention of Human Rights and out of reach of its condemnation.

### - Preliminary remarks

Sweden includes Media Privilege into the broad concept of “right to anonymity” (**chapter 3 of FPA**). It is because Swedish society is ruled by principle of right to anonymity that Media Privilege exists.

### **Chapter 1. On the freedom of the press. Article 1 §3:**

*All persons shall likewise be free, unless otherwise provided in this Act, to communicate information and intelligence on any subject whatsoever, for the purpose of publication in print, to an author or other person who may be deemed to be the originator of material contained in such printed matter, the editor or special editorial office, if any, of the printed matter, or an enterprise which professionally provides news or other information to periodical publications.*

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<sup>34</sup> The prosecutor of Nanterre required illegally from a telephone operator to communicate details to discover phone sources.

[http://fr.wikipedia.org/wiki/Affaire\\_Woerth-Bettencourt#Violations\\_du\\_secret\\_des\\_sources\\_d.27information\\_des\\_journalistes\\_et\\_du\\_secret\\_de\\_l.27enqu.C3.AAte](http://fr.wikipedia.org/wiki/Affaire_Woerth-Bettencourt#Violations_du_secret_des_sources_d.27information_des_journalistes_et_du_secret_de_l.27enqu.C3.AAte)

<sup>35</sup> Mbongo P. (2013), Loi Taubira sur la secret des journalistes : progrès ou régression ? *Huffingtonpost.fr* (online) as accessed on 12/07/2013

<[http://www.huffingtonpost.fr/pascal-mbongo/loi-taubira-sur-secret-des-sources\\_b\\_3459492.html](http://www.huffingtonpost.fr/pascal-mbongo/loi-taubira-sur-secret-des-sources_b_3459492.html)>

<sup>36</sup> The Freedom of Press Act/ Tryckfrihetsförordningen (1949)



### **Chapter 3. On the right to anonymity. Article 1**

*An author of printed matter shall not be obliged to have his or her name, pseudonym or pen-name set out therein. This applies in a similar manner to a person who has communicated information under Chapter 1, Article 1, paragraph three, and to an editor of printed matter other than a periodical.*

We see that Sweden highly encourages “Whistle Blowers”. If an individual acts according **Chapter 1. Article 1 §3**, it will be covered by the right to anonymity of **Chapter 3. Article 1**.

Contrary to previous examples, Swedish Law does not work according the same logic. This is what we will try to highlight.

- Who is entitled to invoke Media Privilege?

It is mainly at the light of **Chapter 3. Article 3** that we can answer to both questions.

### **Chapter 3: On the right to anonymity Article 3**

*A person who has engaged in the production or publication of printed matter, or material intended for insertion therein, and a person who has been active in an enterprise for the publication of printed matter, or an enterprise which professionally provides news or other material to periodicals, may not disclose what has come to his or her knowledge in this connection concerning the identity of an author, a person who has communicated information under Chapter 1, Article 1, paragraph three, or an editor of non-periodical printed matter.*

**Chapter 3. Article 3** obliges individuals to respect Media Privilege (*may not disclose ... concerning the identity of an author, a person who has communicated information under Chapter 1, Article 1, paragraph three, or an editor of non-periodical printed matter*) by individuals covered by the article. Media Privilege is therefore more a “duty of protection of sources” than a “right to protection of sources”.

Who is therefore obliged? Following the statement of Chapter 3. Article 3, we see reference to people involved in information (*“A person who has engaged in the production or publication of printed matter or material intended for insertion therein”*) but also to individuals involved in the publication of printed matter (*“and a person who has been active in an enterprise for the publication of printed matter, or an enterprise which professionally provides news or other material to periodicals”*). Finally, **Chapter 3. Article 4** prescribes the legal regime concerning public authorities and their attempt to disclose sources (*“No public authority or other public body may inquire into the identity of the author of material inserted ... except insofar as this is necessary for the purpose of such prosecution or other action against him or her as is not contrary to the provisions of this Act”*).

Sweden goes very far because any legal attempt to disclose sources will still have to respect duty of confidentiality (*“In cases in which such inquiries may be made, the duty of confidentiality under Article 3 shall be respected”*)

- Is the protection absolute?

No, and it is still **Chapter 3. Article 3** that details restrictions:

### **Chapter 3. Article 3**

*The duty of confidentiality under paragraph one shall not apply:*

1. *if the person in whose favour the duty of confidentiality operates has given his or her consent to the disclosure of his or her identity;*
2. *if the question of identity may be raised under Article 2, paragraph one;*
3. *if the matter concerns an offence specified in Chapter 7, Article 3, paragraph one, point 1;*
4. *in cases where the matter concerns an offence under Chapter 7, Article 2 or 3, paragraph one, point 2 or 3, a court of law deems it necessary for information to be produced during the proceedings as to whether the defendant, or the person suspected on reasonable grounds of the offence, has communicated information or contributed to an item; or*
5. *when, in any other case, a court of law deems it to be of exceptional importance, with regard to a public or private interest, for information concerning identity to be produced on examination of witnesses or of a party in the proceedings under oath.*

Seen Media Privilege is more a “duty” than a “right”, it is totally understandable that consent (from the individual) is free from the obligation (**Subparagraph 1**).

**Subparagraph 2** refers to cases where the author gives signs of its identification when

**Subparagraph 3** emphasizes on specific cases (high treason, espionage, gross espionage, gross unauthorised trafficking in secret information etc...).

**Subparagraph 4** is important because it withdraws protection of sources in case of “wrongful release of an official document to which the public does not have access” and “deliberate disregard of a duty of confidentiality”.

Finally, **Subparagraph 5** refers to a last exception following specific objective criteria:

- An order from the Court
- The exceptional importance of the information
- The existence of a public or private interest.

It must be noted that jurisprudence has brought concrete examples illustrating this overriding interest (For instance. “The interest of an accused person in obtaining information relevant to establishing his or her innocence and the interest of the police in obtaining evidence about crime are examples of such overriding interest”<sup>37</sup>)

- An identity produced on examination of witnesses or of a party in the proceedings under oath. Obviously, Swedish law contains a list of restrictions whose scope is very tight. This is why we may qualify Swedish protection: a “quasi-absolute” protection.

- What about the sanctions?

**Chapter 3 Article 5** provides sanctions for an infringement of Media Privilege. FPA considers any breach as a penal offence and someone breaching Media Privilege will risk a fine but also imprisonment (up to one year). However, the sanction is not automatic because the victim must declare the infringement (“*Legal proceedings may be instituted*”).

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<sup>37</sup> p. 46, Fahy A., *Confidential Sources and Contempt of Court: An argument for change* (Master’s Thesis), Dublin Institute of Technology, 06/02/09

*on account of an offence under paragraph one only provided the injured party has reported the offence for prosecution”).*

This offence makes Sweden the most punitive legal regime of our study. Despite the fact there is no “nullity of act” envisaged, imprisonment penalty is by far the most deterring sanction possible.

- *Is it possible to bypass Media Privilege?*

The FPA does not contain provisions concerning the offence of concealment of confidentiality.

The FPA does not contain provisions concerning investigative measures. That means they are allowed in the restrictions contained in FPA. However, the set of restrictions is limited in such a way that it may not influence journalists’ work

With its “right to anonymity” and its sanction of imprisonment, Sweden is definitely the most protective country concerning Media Privilege.

Contrary to Belgian legislation, *we do not think this system exportable to Montenegro given the cultural differences existing between both countries*<sup>38</sup>. Swedish legislation would be a model, a model to reach rather than a model to copy for Montenegro.

## 2.4 A “VAGUE” PROTECTION ACCORDED BY MONTENEGRO<sup>39</sup>

Today’s Montenegrin Law On Media is inherited from Serbia and Montenegro. Media privilege is covered by **article 21 and 43**<sup>40</sup> of the law on Media. **Article 21** is composed by three paragraphs. §1 and §2 will not be studied because they cover mostly dissemination of information acquired in an illegal way. Only article 21 §3 will drawn to attention:

### §3

*A journalist and other persons who, in the course of gathering, editing or disseminating programme contents, obtain information that could indicate the identity of the source, shall not be obliged to disclose to the legislative, judiciary or executive authority or any other natural or legal person the source of information that wants to remain unknown.*

Media Privilege is covered by only one paragraph making Montenegrin legislation very vague.

- *Who is entitled to invoke Media Privilege?*

*“A journalist and other persons who, in the course of gathering, editing or disseminating programme contents”*

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<sup>38</sup> “The system is a product of a combination of factors that may be unique: a population that is accustomed to regulation and confident in bureaucracy as a solution to social ills; an industry that is prepared to cooperate – with remarkable unanimity – for mutual advantage; a government that may very well legislate if the media becomes overly irresponsible; and a culture that prizes rationality and consensus, and loathes confrontation and mudslinging”

Price, S., Ombudsman to the Swedes, American Journalism Review, April 1998.

<sup>39</sup> Law 01-2808/4 On Media Freedom, 11/13/2002

<sup>40</sup> See appendix IV

No definition of journalist is given by the text. It is consequently impossible to know if by “journalist”, the law refers to professionals or if it includes “casual” journalists. Moreover, the text does not mention any obligation to collaborate “through a media” as can exist in France or Belgium. Thus, “other persons” may refer to editorial staff but also citizens. We must say it is difficult to delimitate the boundaries of the protection. Casual journalists, but also citizens, may fall within the scope of the text this is why a clarification from the legislative or the judiciary may be relevant. We must also highlight the absence of distinction among media platforms.

- *Is the protection absolute?*

*“Shall not be obliged to disclose to the legislative, judiciary or executive authority or any other natural or legal person the source of information that wants to remain unknown”*

Article 23 does not seem to provide exception to Media Privilege. The protection covers threats from three legal powers but also other entities (“any other natural or legal person”). Contrary to three examples exposed, Montenegro is the only country that considers Media Privilege absolute and this position may enter into conflict with the ECHR’s jurisprudence.

- *What are the sanctions?*

#### **Article 43**

*A fine chargeable from twenty-fold to fifty-fold amount of minimum salary in the Republic shall be imposed on media founder if:*

*3) it disseminates information and opinions contrary to the provisions of the Article 23 of this Law;*

Article 43 contains the fine, and the total amount of money prescribed is pretty high when the Montenegrin cost of living is taken into account. It is the “media founder” that will be guilty if there is breach of protection of sources. We therefore see a link with Swedish law due to the fact that Montenegrin legislation sanctions journalists from their disclosure. However, the reference to “media founder” is rather vague. Is it the chief editor? Is it the journalists? A clarification would be of use in this case. What’s more, nothing is stated in Article 43 about penal prosecution or the nullity of acts. If Protection of Sources is an absolute right, it would be normal to include the nullity of act in Court proceedings.

- *What about means to bypass Media Privilege?*

The law on media does not include provisions concerning breach of confidentiality. Prosecuting journalists for concealment is therefore possible. The law also does not refer to seizure, search or wiretapping. This is understandable due to the absolute protection of the law.

*Montenegrin Law On Media provides a good benchmark to ensure protection of sources. However as we underlined it, the law is full of judicial gaps that should be filled in the future.*

However, we must underline the lag that exists between the law and its actual application. Indeed, the condemnation of Petar Komnenić for his refusal to disclose its

sources<sup>41</sup> shows a lack of enforcement. Likewise, a wiretapping scandal<sup>42</sup> against MPs and journalists, recently, broken out in Montenegro. These two issues raise this final question:

Are the authorities willing to correctly enforce today's Law on Media?

Following our study, we have been compiling data in this table:

X	<i>Belgium</i>	<i>France</i>	<i>Sweden</i>	<i>Montenegro</i>
<i>Who is entitled to invoke Media Privilege?</i>	- Focus on information - Anyone taking part in gathering information.	- Focus on journalist - Journalist and editorial staff (criteria of regularity and income)	- Focus on information - Anyone taking part in gathering information.	- Focus on journalist - Journalist (Does it include also casual journalists?) - Citizens?
<i>Is the protection absolute?</i>	NO, 4 objective criteria: - Order from an investigative judge - Information related to a threat to physical integrity of person - Crucial importance - Impossibility to obtain information in another way	NO, 2 criteria: - Overriding interest - Proportionality of measure	NO, but with very limited restrictions	YES
<i>What kind of penalties does the law contain?</i>	No sanction	Nullity of Acts	Imprisonment and Fine to people involved in Media Privilege	Fine to Media Founder
<i>Is it possible to bypass Media Privilege?</i>	- Offence of concealment of confidentiality erased - Investigative measures prescribed by law	- Offence of concealment of confidentiality still existing - Search prescribed by law - Seizure or wiretapping not mentioned	- No reference to the offence of concealment of confidentiality - Investigative measures prescribed by FPA	- Offence of concealment of confidentiality still existing - Investigative measures not mentioned
<i>Level of protection</i>	Legislative	Legislative	Constitutional	Legislative

<sup>41</sup> Ivanović Darko, journalist (Robin Hud), 07/19/2013

<sup>42</sup> Unknown Author (2013), Montenegrin police wiretapped journalists, *B92* as accessed on 07/23/2013

<[http://www.b92.net/eng/news/region.php?yyyy=2013&mm=02&dd=24&nav\\_id=84859](http://www.b92.net/eng/news/region.php?yyyy=2013&mm=02&dd=24&nav_id=84859)>

### 3. A SET OF RECOMMENDATIONS FOR MONTENEGRO

#### 3.1 WHAT SET OF RECOMMENDATIONS SHOULD WE GIVE TO MONTENEGRO?

As was previously stated, Montenegrin Law on Media is a good benchmark to ensure Protection of Sources. We will try to provide tools to enhance the current situation. Once again, the previous methodology will be used.

- *Who should be entitled to invoke Media Privilege?*

As we underlined, it is most important to clarify who is entitled to invoke Media Privilege. In this purpose, we will recommend to adopt the conception in force in Belgium. Indeed, seeing as a revolution is happening in the field of journalism; using a distinction professional/non-professional has become irrelevant (and despite the fact Montenegro has a rather low percentage of people connected to Internet). Focusing on “information” needs a clear definition of it. Thus, **Article 2 §1** of Belgian legislation may be integrated into the Law on Media:

*§1 Each person that contributes directly to the gathering, editing, production or the dissemination of information through medias for the public*

*§2 Collaborators of editorial staff, that is each person who during the performance of its duties may acknowledge information leading to the identification of a source through gathering, editing, the production or dissemination of this information.*

- *Should the protection be absolute?*

Restrictions should definitely be integrated into the law. However, Montenegro is faced with a judicial power that is often criticized for its lack of independence. We would therefore plead for the incorporation of “objective” criteria in the law such as criterion based on criminal offences. Belgian’s “threat to physical integrity” is clear enough to be recommended. The case of Finland must be exposed because Media Privilege cannot be invoked for criminal offences punishable by at least six years of imprisonment. We are in favor of the integration of this concept because it may develop minimum critical faculties (concerning what is a fair breach of Media Privilege) among the population. Because these examples of criminal offences may lead to some “systematic exceptions”, we also recommend the integration of both criteria of “Crucial importance of information” and “Impossibility to obtain information in another way” in the law. Despite accusations of lack of independence of justice, we still think casual breach should be allowed only by an independent judge (investigative judge for instance).

- *What kind of penalties should the law contain?*

Using finés as a mean to deter any behavior endangering Media Privilege is a good idea. However, we would plead for its extension to any “person breaching Protection of Source”. Using the French example, we would also recommend the integration of the “Nullity of Acts” in the set of sanctions of the new law on Protection of Sources.

- *What about means to bypass Media Privilege?*

We highly recommend the cancelation of the offence of concealment of confidentiality for people entitled to invoke Media Privilege. Following the pragmatism of Belgian

legislation, we would also recommend to define the legal regime concerning search, seizure and wiretapping investigative measures. Thus, they should be allowed if the data is crucial to prevent the offence stated in restrictions.

### **3.2 A SAMPLE OF LESGISLATION AS AN EXAMPLE FOR MONTENEGRO**

In this sample, we have decided to compile the set of recommendations with the current law in force in Montenegro. This can be seen by the sentences “strikethroughed” and by the new articles added (Article 21-1, 21-2, 21-3 and 43-1). This sample aims at giving a quick glance of how could be the amended law (articles erased and articles added).

#### **Article 21**

Any information gathered in an illegal manner shall be publicized only in the interest of national security, protection of territorial integrity or public safety, prevention of disorder or criminal and health or moral protection, as well as the protection of reputation or rights of others, prevention of credential information disclosure or with the aim to protect the authority and impartiality of the judiciary.

~~A journalist or media shall not be held accountable if, in the course of their work, they obtain or disseminate the information that is considered to be a state, military, official or business secret, if there is an overriding interest of the public to be informed.~~

#### **Article 21-1**

*Those entitled to protection of sources are these persons:*

*§1 Each person that contributes directly to the gathering, editing, production or the dissemination of information through medias for the public*

*§2 Editorial staff collaborators, that is, each person who during the performance of their duties may acknowledge information leading to the identification of a source through gathering, editing, the production or dissemination of these information.*

#### **Article 21-2**

*People entitled by Article 21-1 to protection of sources may be obliged to disclose their source of information, only after order from a judge, and if they may contribute to the prevention of the commission of an offence punishable by six years of imprisonment, and if these cumulative conditions are fulfilled:*

- 1) The information has a crucial importance for the prevention of the offence*
- 2) The information asked cannot be obtained in another way*

#### **Article 21-3**

*People covered by Article 21-1 may not be prosecuted for concealment of judicial or professional confidentiality if they use their right not to disclose their sources*

#### **Article 21-4**

*Investigative measures such as search, seizure or wiretapping may concern sources of information of people covered by Article 21-1 only if the data is crucial to prevent the commission of offence stated in Article 21-2 and with respect to the conditions prescribed in it.*

**Article 43**

A fine chargeable from twenty-fold to fifty-fold amount of minimum salary in the Republic shall be imposed on a media founder if:

- 1) it disseminates a piece of information obtained in an unlawful way contrary to the Article 21, paragraph 1 of this Law;
- 2) it fails to protect the integrity of minors pursuant to the provisions of the Article 22 of this Law;
- 3) ~~it disseminates information and opinions contrary to the provisions of the Article 23 of this Law;~~
- 4) it disseminates an advertisement contrary to the Article 24 of this Law;
- 5) it fails to disseminate the information about the result of criminal proceedings based on the final judgment (Article 25, paragraph 2).

**Article 43-1**

*A fine chargeable from twenty-fold to fifty-fold amount of minimum salary in the Republic shall be imposed on each individual breaching protection of sources in other ways than the one prescribed by Article 21-2 of the same law.*

*Is considered null and void in Court proceedings any evidence obtained by violation of article 21-1 and Article 21-2 of the same law*



## APPENDIX I

### 7 APRIL 2005. — Loi relative à la protection des sources journalistes

ALBERT II, Roi des Belges,

A tous, présents et à venir, Salut.

Les Chambres ont adopté et Nous sanctionnons ce qui suit :

#### Article 1

La présente loi règle une matière visée à l'article 78 de la Constitution.

#### Article 2

Bénéficient de la protection des sources telle que définie à l'article 3, les personnes suivantes :

1° les journalistes, soit toute personne qui, dans le cadre d'un travail indépendant ou salarié, ainsi que toute personne morale, contribue régulièrement et directement à la collecte, la rédaction, la production ou la diffusion d'informations, par le biais d'un média, au profit du public;

2° les collaborateurs de la rédaction, soit toute personne qui, par l'exercice de sa fonction, est amenée à prendre connaissance d'informations permettant d'identifier une source et ce, à travers la collecte, le traitement éditorial, la production ou la diffusion de ces mêmes informations.

#### **Nouvel Article 2** (*modifié par l'arrêt de la Cour d'arbitrage du 7 juin 2006*)

Bénéficient de la protection des sources telle que définie à l'article 3, les personnes suivantes :

1° toute personne qui contribue directement à la collecte, la rédaction, la production ou la diffusion d'informations, par le biais d'un média, au profit du public ;

2° les collaborateurs de la rédaction, soit toute personne qui, par l'exercice de sa fonction, est amenée à prendre connaissance d'informations permettant d'identifier une source et ce, à travers la collecte, le traitement éditorial, la production ou la diffusion de ces mêmes informations.

#### Article 3

Les personnes visées à l'article 2 ont le droit de taire leurs sources d'information.

Sauf dans les cas visés à l'article 4, elles ne peuvent pas être contraintes de révéler leurs sources d'information et de communiquer tout renseignement, enregistrement et document susceptible notamment:

1° de révéler l'identité de leurs informateurs;

2° de dévoiler la nature ou la provenance de leurs informations;

3° de divulguer l'identité de l'auteur d'un texte ou d'une production audiovisuelle;

4° de révéler le contenu des informations et des documents eux-mêmes, dès lors qu'ils permettent d'identifier l'informateur.

#### **Article 4**

Les personnes visées à l'article 2 ne peuvent être tenues de livrer les sources d'information visées à l'article 3 qu'à la requête du juge, si elles sont de nature à prévenir la commission d'infractions constituant une menace grave pour l'intégrité physique d'une ou de plusieurs personnes en ce compris les infractions visées à l'article 137 du Code pénal, pour autant qu'elles portent atteinte à l'intégrité physique, et si les conditions cumulatives suivantes sont remplies :

1° les informations demandées revêtent une importance cruciale pour la prévention de la commission de ces infractions;

2° les informations demandées ne peuvent être obtenues d'aucune autre manière.

#### **Article 5**

Les mesures d'information ou d'instruction telles que fouilles, perquisitions, saisies, écoutes téléphoniques et enregistrements ne peuvent concerner des données relatives aux sources d'information des personnes visées à l'article 2 que si ces données sont susceptibles de prévenir la commission des infractions visées à l'article 4, et dans le respect des conditions qui y sont définies.

#### **Article 6**

Les personnes visées à l'article 2 ne peuvent être poursuivies sur la base de l'article 505 du Code pénal lorsqu'elles exercent leur droit à ne pas révéler leurs sources d'information.

#### **Article 7**

En cas de violation du secret professionnel au sens de l'article 458 du Code pénal, les personnes visées à l'article 2 ne peuvent être poursuivies sur la base de l'article 67, alinéa 4, du Code pénal lorsqu'elles exercent leur droit à ne pas révéler leurs sources d'information

## **APPENDIX II**

### **LOI n° 2010-1 du 4 janvier 2010 relative à la protection du secret des sources des journalistes**

L'Assemblée nationale et le Sénat ont adopté,  
Le Président de la République promulgue la loi dont la teneur suit:

#### **Article 1**

La loi du 29 juillet 1881 sur la liberté de la presse est ainsi modifiée:  
1° L'article 2 devient l'article 3;

2° L'article 2 est ainsi rétabli:

« Art. 2.-Le secret des sources des journalistes est protégé dans l'exercice de leur mission d'information du public.

« Est considérée comme journaliste au sens du premier alinéa toute personne qui, exerçant sa profession dans une ou plusieurs entreprises de presse, de communication au public en ligne, de communication audiovisuelle ou une ou plusieurs agences de presse, y pratique, à titre régulier et rétribué, le recueil d'informations et leur diffusion au public.

« Il ne peut être porté atteinte directement ou indirectement au secret des sources que si un impératif prépondérant d'intérêt public le justifie et si les mesures envisagées sont strictement nécessaires et proportionnées au but légitime poursuivi. Cette atteinte ne peut en aucun cas consister en une obligation pour le journaliste de révéler ses sources.  
« Est considéré comme une atteinte indirecte au secret des sources au sens du troisième alinéa le fait de chercher à découvrir les sources d'un journaliste au moyen d'investigations portant sur toute personne qui, en raison de ses relations habituelles avec un journaliste, peut détenir des renseignements permettant d'identifier ces sources.

« Au cours d'une procédure pénale, il est tenu compte, pour apprécier la nécessité de l'atteinte, de la gravité du crime ou du délit, de l'importance de l'information recherchée pour la répression ou la prévention de cette infraction et du fait que les mesures d'investigation envisagées sont indispensables à la manifestation de la vérité. »

3° L'article 35 est complété par un alinéa ainsi rédigé:

« Le prévenu peut produire pour les nécessités de sa défense, sans que cette production puisse donner lieu à des poursuites pour recel, des éléments provenant d'une violation du secret de l'enquête ou de l'instruction ou de tout autre secret professionnel s'ils sont de nature à établir sa bonne foi ou la vérité des faits diffamatoires. »

## Article 2

L'article 56-2 du code de procédure pénale est ainsi rédigé:  
« Art. 56-2.-Les perquisitions dans les locaux d'une entreprise de presse, d'une entreprise de communication audiovisuelle, d'une entreprise de communication au public en ligne, d'une agence de presse, dans les véhicules professionnels de ces entreprises ou agences ou au domicile d'un journaliste lorsque les investigations sont liées à son activité professionnelle ne peuvent être effectuées que par un magistrat.  
« Ces perquisitions sont réalisées sur décision écrite et motivée du magistrat qui indique la nature de l'infraction ou des infractions sur lesquelles portent les investigations, ainsi que les raisons justifiant la perquisition et l'objet de celle-ci. Le contenu de cette décision est porté dès le début de la perquisition à la connaissance de la personne présente en application de l'article 57.

« Le magistrat et la personne présente en application de l'article 57 ont seuls le droit de prendre connaissance des documents ou des objets découverts lors de la perquisition préalablement à leur éventuelle saisie. Aucune saisie ne peut concerner des documents ou des objets relatifs à d'autres infractions que celles mentionnées dans cette décision.

« Ces dispositions sont édictées à peine de nullité.

« Le magistrat qui effectue la perquisition veille à ce que les investigations conduites respectent le libre exercice de la profession de journaliste, ne portent pas atteinte au secret des sources en violation de l'article 2 de la loi du 29 juillet 1881 sur la liberté de la presse et ne constituent pas un obstacle ou n'entraînent pas un retard injustifié à la diffusion de l'information.

« La personne présente lors de la perquisition en application de l'article 57 du présent code peut s'opposer à la saisie d'un document ou de tout objet si elle estime que cette saisie serait irrégulière au regard de l'alinéa précédent. Le document ou l'objet doit alors être placé sous scellé fermé. Ces opérations font l'objet d'un procès-verbal mentionnant les objections de la personne, qui n'est pas joint au dossier de la procédure. Si d'autres documents ou objets ont été saisis au cours de la perquisition sans soulever de contestation, ce procès-verbal est distinct de celui prévu par l'article 57. Ce procès-verbal ainsi que le document ou l'objet placé sous scellé fermé sont transmis sans délai au juge des libertés et de la détention, avec l'original ou une copie du dossier de la procédure.

« Dans les cinq jours de la réception de ces pièces, le juge des libertés et de la détention statue sur la contestation par ordonnance motivée non susceptible de recours.

« A cette fin, il entend le magistrat qui a procédé à la perquisition et, le cas échéant, le procureur de la République, ainsi que la personne en présence de qui la perquisition a été effectuée. Il peut ouvrir le scellé en présence de ces personnes. Si le journaliste au domicile duquel la perquisition a été réalisée n'était pas présent lorsque celle-ci a été effectuée, notamment s'il a été fait application du deuxième alinéa de l'article 57, le journaliste peut se présenter devant le juge des libertés et de la détention pour être entendu par ce magistrat et assister, si elle a lieu, à l'ouverture du scellé.  
« S'il estime qu'il n'y a pas lieu à saisir le document ou l'objet, le juge des libertés et de la

détention ordonne sa restitution immédiate, ainsi que la destruction du procès-verbal des opérations et, le cas échéant, la cancellation de toute référence à ce document, à son contenu ou à cet objet qui figurerait dans le dossier de la procédure. « Dans le cas contraire, il ordonne le versement du scellé et du procès-verbal au dossier de la procédure. Cette décision n'exclut pas la possibilité ultérieure pour les parties de demander la nullité de la saisie devant, selon les cas, la juridiction de jugement ou la chambre de l'instruction. »

### **Article 3**

L'article 56-1 du même code est ainsi modifié:

1° Aux troisième et quatrième phrases du premier alinéa, après le mot : « documents », sont insérés les mots : « ou des objets »

2° Le troisième alinéa est ainsi modifié:

a) A la première phrase, les mots: « à laquelle le magistrat a l'intention de procéder » sont remplacés par les mots : « ou d'un objet »

b) A la deuxième phrase, après le mot: « document », sont insérés les mots : « ou l'objet »

c) A la quatrième phrase, après le mot : « documents », sont insérés les mots : « ou d'autres objets »

d) A la dernière phrase, après le mot: « document », sont insérés les mots : « ou l'objet »

3° Au sixième alinéa, après les mots : « le document », sont insérés les mots : « ou l'objet » et les mots : « ou à son contenu » sont remplacés par les mots : « , à son contenu ou à cet objet ».

### **Article 4**

I. — Le deuxième alinéa de l'article 326 du même code est complété par une phrase ainsi rédigée:

«L'obligation de déposer s'applique sous réserve des [dispositions des articles 226-13 et 226-14 du code pénal](#) et de la faculté, pour tout journaliste entendu comme témoin sur des informations recueillies dans l'exercice de son activité, de ne pas en révéler l'origine.»

II. — L'article 437 du même code est ainsi rédigé:

« Art. 437. - Toute personne citée pour être entendue comme témoin est tenue de comparaître, de prêter serment et de déposer sous réserve des [dispositions des articles 226-13 et 226-14 du code pénal](#).

« Tout journaliste entendu comme témoin sur des informations recueillies dans l'exercice de son activité est libre de ne pas en révéler l'origine. »

## **Article 5**

I. — L'article 60-1 du même code est complété par un alinéa ainsi rédigé:

« A peine de nullité, ne peuvent être versés au dossier les éléments obtenus par une réquisition prise en violation de l'article 2 de la loi du 29 juillet 1881 sur la liberté de la presse. »

II. — Les articles 77-1-1 et 99-3 du même code sont complétés par un alinéa ainsi rédigé:  
« Le dernier alinéa de l'article 60-1 est également applicable. »

## **Article 6**

L'article 100-5 du même code est complété par un alinéa ainsi rédigé :  
« A peine de nullité, ne peuvent être transcrites les correspondances avec un journaliste permettant d'identifier une source en violation de l'article 2 de la loi du 29 juillet 1881 sur la liberté de la presse. »

## **Article 7**

La présente loi est applicable sur tout le territoire de la République française.  
La présente loi sera exécutée comme loi de l'Etat.

Fait à Paris, le 4 janvier 2010.

## **APPENDIX III**

### **The Freedom of Press Act/ Tryckfrihetsförordningen (1949)**

#### Chapter 1. On the freedom of the press

##### **Article 1**

The freedom of the press is understood to mean the right of every Swedish citizen to publish written matter, without prior hindrance by a public authority or other public body, and not to be prosecuted thereafter on grounds of its content other than before a lawful court, or punished therefore other than because the content contravenes an express provision of law, enacted to preserve public order without suppressing information to the public.

In accordance with the principles set out in paragraph one concerning freedom of the press for all, and to secure the free exchange of opinion and availability of comprehensive information, every Swedish citizen shall be free, subject to the rules contained in this Act for the protection of private rights and public safety, to express his or her thoughts and opinions in print, to publish official documents and to communicate information and intelligence on any subject whatsoever.

All persons shall likewise be free, unless otherwise provided in this Act, to communicate information and intelligence on any subject whatsoever, for the purpose of publication in print, to an author or other person who may be deemed to be the originator of material contained in such printed matter, the editor or special editorial office, if any, of the printed matter, or an enterprise which professionally provides news or other information to periodical publications.

All persons shall furthermore have the right, unless otherwise provided in this Act, to procure information and intelligence on any subject whatsoever, for the purpose of publication in print, or in order to communicate information under the preceding paragraph.

#### Chapter 3: On the right to anonymity

##### **Article 1**

An author of printed matter shall not be obliged to have his or her name, pseudonym or pen-name set out therein. This applies in a similar manner to a person who has communicated information under Chapter 1, Article 1, paragraph three, and to an editor of printed matter other than a periodical.

##### **Article 2**

It shall not be permitted to inquire into the identity of an author or a person who has communicated information under Chapter 1, Article 1, paragraph three, in a case relating to an offence against the freedom of the press, nor shall it be permitted to

inquire into the identity of the editor of non-periodical printed matter. However if, where non-periodical printed matter is concerned, the author or editor has been identified on the publication by name, or by means of a pseudonym or pen-name known generally to refer to a particular person, or if a person has acknowledged in a written statement that he or she is the author or editor, or has voluntarily made such a declaration before a court of law during the case, then the question of whether he or she is liable may be considered during the proceedings.

The provisions of paragraph one notwithstanding, the question of liability for an offence under Chapter 7, Article 3, may be examined in the same court proceedings as cases referred to therein.

### **Article 3**

A person who has engaged in the production or publication of printed matter, or material intended for insertion therein, and a person who has been active in an enterprise for the publication of printed matter, or an enterprise which professionally provides news or other material to periodicals, may not disclose what has come to his or her knowledge in this connection concerning the identity of an author, a person who has communicated information under Chapter 1, Article 1, paragraph three, or an editor of non-periodical printed matter. The duty of confidentiality under paragraph one shall not apply:

- 1) if the person in whose favour the duty of confidentiality operates has given his or her consent to the disclosure of his or her identity;
- 2) if the question of identity may be raised under Article 2, paragraph one;
- 3) if the matter concerns an offence specified in Chapter 7, Article 3, paragraph one, point 1;
- 4) in cases where the matter concerns an offence under Chapter 7, Article 2 or 3, paragraph one, point 2 or 3, a court of law deems it necessary for information to be produced during the proceedings as to whether the defendant, or the person suspected on reasonable grounds of the offence, has communicated information or contributed to an item; or
- 5) when, in any other case, a court of law deems it to be of exceptional importance, with regard to a public or private interest, for information concerning identity to be produced on examination of witnesses or of a party in the proceedings under oath.

In examination under paragraph two, point 4 or 5, the court shall scrupulously ensure that no questions are put which might encroach upon a duty of confidentiality in excess of what is permissible in each particular case.

### **Article 4**

No public authority or other public body may inquire into the identity of the author of material inserted, or intended for insertion, in printed matter, a person who has published, or who intends to publish, material in such matter, or a person who has communicated information under Chapter 1, Article 1, paragraph three, except insofar as this is necessary for the purpose of such prosecution or other action against him or



her as is not contrary to the provisions of this Act. In cases in which such inquiries may be made, the duty of confidentiality under Article 3 shall be respected. Nor may a public authority or other public body intervene against a person because he or she has in printed matter made use of his or her freedom of the press or assisted therein.

## **Article 5**

A person who, whether through negligence or by deliberate intent, inserts in printed matter the name, pseudonym or pen-name of the author, or, in a case under Article 1, the editor or source, against his or her wishes, or disregards a duty of confidentiality under Article 3, shall be sentenced to payment of a fine or to imprisonment for up to one year. The same penalty shall apply to a person who, whether through negligence or by deliberate intent, publishes in printed matter as that of the author, editor or source, the name, pseudonym or pen-name of a person other than the true author, editor or source. Inquiries made in breach of Article 4, paragraph one, sentence one, if made deliberately, shall be punishable by a fine or imprisonment for up to one year. Deliberate action in breach of Article 4, paragraph two, provided the said measure constitutes summary dismissal, notice of termination, imposition of a disciplinary sanction or similar measure, shall be punishable by a fine or imprisonment for up to one year.

Legal proceedings may be instituted on account of an offence under paragraph one only provided the injured party has reported the offence for prosecution.

## **Article 6**

For the purposes of this Chapter, a person deemed to be the originator of material inserted or intended for insertion in printed matter is equated with an author.

## **Chapter 7. On offences against the freedom of the press:**

### **Article 2**

No statement in an advertisement or other similar communication shall be deemed an offence against the freedom of the press if it is not readily apparent from the content of the communication that liability for such an offence may be incurred. If the communication is punishable under law, having regard also to circumstances which are not readily apparent from its content, the relevant provisions of law apply. The foregoing applies in a similar manner to a communication conveyed in cypher or by other means secret from the general public.

### **Article 3**

If a person communicates information under Chapter 1, Article 1, paragraph three, or if, without being responsible under the provisions of Chapter 8, he or she contributes to material intended for insertion in printed matter, as author or other originator or as editor, thereby rendering himself or herself guilty of:

- 1) high treason, espionage, gross espionage, gross unauthorised trafficking in secret information, insurrection, treason or betrayal of country, or any attempt, preparation or conspiracy to commit such an offence;
- 2) wrongful release of an official document to which the public does not have access, or release of such a document in contravention of a restriction imposed by a public authority at the time of its release, where the act is deliberate; or
- 3) deliberate disregard of a duty of confidentiality, in cases specified in a special act of law;

Provisions of law concerning liability for such an offence apply.

If a person procures information or intelligence for a purpose referred to in Chapter 1, Article 1, paragraph four, thereby rendering himself or herself guilty of an offence under paragraph one, point 1 of this Article, provisions of law concerning liability for such an offence apply.

The provisions of Chapter 2, Article 22, paragraph one of the Instrument of Government shall apply also in respect of proposals for provisions under paragraph one, point 3.

## **APPENDIX IV**

### **Law 01-2808/4 On Media Freedom, 11/13/2002**

#### **Article 21**

Any information gathered in an illegal manner shall be publicized only in the interest of national security, protection of territorial integrity or public safety, prevention of disorder or criminal and health or moral protection, as well as the protection of reputation or rights of others, prevention of credential information disclosure or with the aim to protect the authority and impartiality of the judiciary.

A journalist or media shall not be held accountable if, in the course of their work, they obtain or disseminates the information that is considered to be state, military, official or business secret, if there is an overriding interest of the public to be informed.

A journalist and other persons who, in the course of gathering, editing or disseminates programme contents, obtain information that could indicate the identity of the source, shall not be obliged to disclose to the legislative, judiciary or executive authority or any other natural or legal person the source of information that wants to remain unknown.

#### **Article 43**

A fine chargeable from twenty-fold to fifty-fold amount of minimum salary in the Republic shall be imposed on a medium founder if:

- 6) it disseminates an information obtained in an unlawful way contrary to the Article 21, paragraph 1 of this Law;
- 7) it fails to protect the integrity of minors pursuant to the provisions of the Article 22 of this Law;
- 8) it disseminates information and opinions contrary to the provisions of the Article 23 of this Law;
- 9) it disseminates an advertisement contrary to the Article 24 of this Law;
- 10) it fails to disseminates the information about the result of criminal proceedings based on the final judgment (Article 25, paragraph 2);

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